

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States v. Maria Guadalupe Devalle

United States v. Devalle, 894 F.2d 133 (5th Cir. 1990) · No. No. 89-2070 · Decided February 1, 1990

SUMMARY

The Fifth Circuit held that a defendant's voluntary fugitive status, even if she is recaptured before the dismissal motion is filed, permits the appellate court to dismiss the appeal from the conviction. However, sentencing in absentia for a felony violates Fed. R. Crim. P. 43, and the sentences must be vacated and remanded for resentencing in the defendant's presence. The court also ruled that charges of transporting and harboring the same alien under 8 U.S.C. § 1324(a)(1)(B) and (C) are not multiplicitous when based on distinct conduct at separate times and places.

CASE DETAILS

COURT	United States Court of Appeals for the Fifth Circuit
WRITING FOR THE COURT	GARWOOD; POLITZ; JOLLY
JURISDICTION	Federal
DECIDED	February 1, 1990
DOCKET	No. 89-2070
DISPOSITION	vacated
PROCEDURAL POSTURE	Appeal from the United States District Court for the Southern District of Texas
PRECEDENTIAL VALUE	Published
PARTIES	Maria Guadalupe DeValle v. United States of America

TOPICS

- criminal procedure
- appellate procedure
- motions to dismiss

PRACTICE AREAS

- Criminal Law
- Immigration Law

QUESTIONS PRESENTED

1. Whether the appellate court has authority to dismiss the appeal because the defendant became a fugitive from justice after conviction but before appeal.

2. Whether the district court erred in sentencing the defendant in absentia in violation of Rule 43.
3. Whether the substantive counts of transporting and harboring an alien are multiplicitious and cannot support separate sentences.

HOLDINGS

1. The court has authority to dismiss the appeal as to the convictions but not as to the sentences. The court exercises its discretion to dismiss the conviction appeal but not the sentence appeal.
2. The district court erred in sentencing DeValle in absentia. The sentencing is vacated and the case is remanded for resentencing in her presence.
3. The counts are not multiplicitious because they involve separate and distinct conduct: transporting from Brownsville to Houston and harboring in a Houston apartment. They are separate offenses under different subsections of 8 U.S.C. § 1324(a)(1).

KEY QUOTATIONS

“It is settled that where a defendant becomes a fugitive from justice during the pendency of her appeal, the appellate court has the authority to dismiss the appeal.” (at 133)

“Based on the foregoing, we conclude that we have the authority to dismiss the appeal insofar as it is from DeValle’s convictions.” (at 134)

“we now set aside DeValle’s sentences and remand for resentencing because of the error in sentencing her in absentia.” (at 135)

“it is clear that separate and distinct conduct is the basis of each of the substantive offenses, the transporting being the automobile trip from the vicinity of Brownsville to Houston, during which DeValle accompanied the alien, and the harboring consisting of several hours of keeping the alien, after the trip was completed, in a specified apartment in Houston.” (at 135)

FACTUAL BACKGROUND

DeValle was convicted of conspiring to transport and harbor an alien, and substantive counts of transporting the alien from Brownsville to Houston and harboring the alien in a Houston apartment. After conviction, she failed to report to probation and became a fugitive. She was sentenced in absentia approximately two months after conviction. She was recaptured during the appeal.

PROCEDURAL HISTORY

DeValle was convicted after jury trial of conspiracy to transport and harbor an alien, and substantive counts of transporting and harboring. She was released on bond but became a fugitive after conviction. The district court sentenced her in absentia. She was recaptured during the pendency of her appeal. The government moved to dismiss the appeal.

DISPOSITION

vacated

REMAND INSTRUCTIONS

Resentence in DeValle's presence.

CASES CITED

- United States v. Glomb, 877 F.2d 1 (5th Cir. 1989)
- Estrada v. United States, 585 F.2d 742 (5th Cir. 1978)
- United States v. Shelton, 508 F.2d 797 (5th Cir. 1975)
- Van Blaricom v. Forscht, 490 F.2d 461 (5th Cir. 1974)
- United States v. Eberhardt, 467 F.2d 578 (5th Cir. 1972)
- United States v. Puzzanghera, 820 F.2d 25 (1st Cir. 1987)
- United States v. Parrish, 887 F.2d 1107 (D.C. Cir. 1989)
- United States v. Persico, 853 F.2d 134 (2d Cir. 1988)
- United States v. Holmes, 680 F.2d 1372 (11th Cir. 1982)
- United States v. London, 723 F.2d 1538 (11th Cir. 1984)
- United States v. Anagnos, 853 F.2d 1 (1st Cir. 1988)
- United States v. Snow, 748 F.2d 928 (4th Cir. 1984)
- United States v. Songer, 842 F.2d 240 (10th Cir. 1988)
- United States v. Brown, 456 F.2d 1112 (5th Cir. 1972)
- United States v. Sanchez-Vargas, 878 F.2d 1163 (9th Cir. 1989)
- United States v. Boykin, 222 F. Supp. 398 (D. Md. 1963)
- Byrd v. Hopper, 537 F.2d 1303 (5th Cir. 1976)
- Ray v. United States, 481 U.S. 736 (1987)